FILED
AUG 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-153

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

BILL ARMONTROUT, Warden, Missouri State Penitentiary,
Petitioner,

vs.

EDWARD PARTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent incorporates the constitutional and statutory provisions set forth in the Petition for Certiorari, and adds thereto the following:

1. Section 549.261.1 R.S.Mo. (1969) (repealed 1982), provided as follows:

> When in its opinion there is a reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release or parole any person confined in any correctional institution administered by state authorities. All paroles shall issue upon order of the board, duly adopted.

STATEMENT OF THE CASE

Respondent Edward Parton has been incarcerated with the Missouri Department of Corrections since 1971, following his conviction for statutory rape. That conviction and sentenced were affirmed on direct appeal. State of Missouri v. Parton, 487 S.W.2d 523 (Mo. 1972). In addition, Respondent sought post-conviction relief as well as coram nobis, all of which were denied. Parton v. State of Missouri, 545 S.W.2d 338 (Mo.App. 1976). On September 23, 1985, Respondent filed the Petition for a Writ of Habeas Corpus, which is the subject of this action, in the United States District Court for the Eastern District of Missouri. The Petition was not a collateral attack on Respondent's 1971 conviction. Rather, the Petition challenged the extension and subsequent cancellation of Respondent's scheduled release on parole.

A number of events led to the filing of this Petition. The Missouri Board of Probation and Parole Scheduled Petitioner to be released on parole on August 23, 1984. On May 1, 1984, Respondent was notified that his release date of August 23, 1984 was being extended until January 11, 1985, as a result of his failure to complete Phase II of the Missouri Sexual Offender Program ("MOSOP"). On November 7, 1984, Respondent was notified that his release date of January 11, 1985 was being cancelled solely because of his failure to complete Phase II of MOSOP. Respondent was never given a hearing, either prior to or after the extension and subsequent cancellation of his parole. Respondent remains incarcerated at the present time.

The parole statute in effect at the time of the commission of the crime for which Respondent was convicted was Section 549.261 R.S.Mo. (1969) (repealed 1982). That section was repealed in 1982, and was replaced by the current parole statute, Section 217.690 R.S.Mo. (1986). In 1980, the Missouri Legislature enacted the Sexual Assault Prevention Act, which was codified in Sections 589.010 to 589.040 R.S.Mo. (1986).

Section 589.040.1 of that Act requires the Director of the Department of Corrections and Human Resources to develop a program of treatment, education and rehabilitation for sexual offenders. The MOSOP was developed pursuant to that section. In addition, Section 589.040.2 requires that all sexual offenders participate in the programs developed under the Act.

Subsequent to the enactment of the Sexual Assault Prevention Act, and the development of the MOSOP, the Missouri Department of Corrections and Human Resources promulgated and adopted a regulation which requires that all sexual offenders participate in and complete the prescribed treatment program prior to being eligible for parole. 14 C.S.R. 80-2.010(4)(D). There is no dispute that the MOSOP completion requirement as a condition of parole eligibility was applied retroactively to Respondent in this case.

Respondent's Petition challenged the extension and cancellation of his parole without due process, and also challenged the retroactive application to him of the MOSOP completion requirement as a requirement for parole eligibility. The United States District Court for the Eastern District of Missouri adopted the Report and Recommendation of United States Magistrate Carol Jackson, which found that Respondent's parole was improperly extended and cancelled without due process. In addition, the District Court adopted the Magistrate's finding that the retroactive application of the MOSOP completion requirement as condition of parole eligibility violated the Ex Post Facto Clause. This holding was affirmed by the United States Court of Appeals for the Eighth Circuit. Petitioner now seeks discretionary review of the decision of the Eighth Circuit Court of Appeals by a writ of certiorari.

ARGUMENT

PETITIONER HAS FAILED TO PRESENT SUFFICIENT GROUNDS FOR THE EXERCISE OF THIS COURT'S DISCRETIONARY REVIEW ON WRIT OF CERTIORARI.

United States Supreme Court review on writ of certiorari is a matter of judicial discretion and not a matter of right. Supreme Court Rule 17 provides that certiorari will be granted "only when there are special and important reasons therefor." Certiorari should be denied in this case because the court below fully considered and correctly decided the issue presented; there is no conflict between the decision of the court below and the Missouri Supreme Court; and the issue is not important enough to warrant review on certiorari.

A. The United States Court of Appeals for the Eighth Circuit fully considered and correctly decided the issue raised in the Petition for Writ of Certiorari.

The United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the Eastern District of Missouri, which had adopted the Report and Recommendation of U.S. Magistrate Carol Jackson. A brief examination of the particular facts of this case, and the applicable law reveals that the issue raised by Petitioner was fully considered and correctly decided below.

Respondent was convicted of statutory rape in 1971. A prisoner must be considered for parole under the statute and guidelines in effect at the time of the commission of the crime. Parker v. Corrothers, 750 F.2d 653, 661 (8th Cir. 1984). The Missouri parole statute in effect at the time of Respondent's conviction, Mo.Rev.Stat. §549.261 (1969) (repealed 1982), provided, in part, as follows:

> When in its opinion there is a reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release or parole any person confined in any correctional institution administered by state authorities. . . .

§549.261.1 (1969) (emphasis added). The Eighth Circuit Court of Appeals has held that §549.261 created a liberty interest in parole, because it created a justifiable expectation of release under certain circumstances. Williams v. Missouri Board of Probation and Parole, 661 F.2d 697, 699 (8th Cir. 1981) cert. denied, 455 U.S. 993 (1982); Burnside v. White, 760 F.2d 217, 220 (8th Cir. 1985) cert. denied, 474 U.S. 1022 (1985).[1]

Applying this holding to the present case, the Magistrate stated as follows:

> Under §549.261 once the Board determined that statutory and regulatory guidelines had been met, release was mandatory and this gave rise to a protected entitlement.

(Petition, p. A-14).[2] As the Magistrate correctly noted, the Parole Board evidently determined that by August 23, 1984, Respondent could be released on parole without detriment to himself or to the community. Under the applicable parole statute, §549.261, Respondent acquired a justifiable expectation of release which could not be taken absent due process. Nevertheless, Petitioner's August 23, 1984 release date was extended to January 11, 1985, and subsequently cancelled without a hearing. The Magistrate correctly found this to be impermissible, and the Court of Appeals affirmed.

The Court of Appeals was also correct in affirming the Magistrate's finding that the retroactive application of the MOSOP completion requirement as a condition for parole eligibility violated the ex post facto clause. The issue of whether a retroactive application of a parole eligibility requirement is permissible has been addressed and resolved by numerous federal courts. As Petitioner notes, this Court has previously

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[1] On page seven (7) of the Petition for Certiorari herein, Petitioner states that the grant of parole is discretionary with the Missouri Board of Probation and Parole. While this statement is undoubtedly true under the current Missouri parole statute, §217.690 R.S.Mo. (1986), it is also clear that the current statute is not applicable to Respondent in that it was not in effect at the time of his conviction. Parker, 750 F.2d at 661.

[2] References to "Petition" are to the Petition for Certiorari filed herein.

indicated that a retroactive application of a parole eligibility requirement would violate the ex post facto clause. Warden v. Marrero, 417 U.S. 653, 663, 94 S.Ct. 2532. 2538, 41 L.Ed.2d 383 (1974). Also, Petitioner correctly points out that the federal courts of appeal have uniformly followed this rule. Fender v. Thompson, 883 F.2d 303, 305-306 (4th Cir. 1989); Burnside v. White, 760 F.2d 217, 220 (8th Cir. 1985), cert. denied, 474 U.S. 1022 (1985); Lerner v. Gill, 751 F.2d 450, 454 (1st Cir. 1985)cert. denied, 472 U.S. 1010 (1985); Beebe v. Phelps, 650 F.2d 774, 777 (5th Cir. 1981); Rodriguez v. United States Parole Commission, 594 F.2d 170, 176 (7th Cir. 1979). This issue is particularly well-settled, both in the federal courts of appeal and in this Court. The Court of Appeals fully considered this issue, followed applicable precedents, and correctly affirmed the lower court's decision. Thus, there is no need for discretionary review by this Court.

Petitioner also argues that the MOSOP completion requirement is not a retroactive "legislative act" because it was promulgated by the Missouri Board of Probation and Parole. This issue was also fully considered and correctly decided by the court below. As the Magistrate correctly noted in her Report, where a legislature delegates to an agency the authority to make rules, the resulting rules are an extension of the legislative action for ex post facto purposes. Rodriguez v. U.S. Parole Commission, 594 F.2d 170 (7th Cir. 1979). See also Yamamoto v. U.S. Parole Commission, 794 F.2d 1295, 1300 (8th Cir. 1986). Thus, the MOSOP completion requirement was properly considered a retroactive legislative act by the court below.

Finally, Petitioner's contention that an increased parole eligibility requirement is not greater punishment is without merit. Cases which have considered this issue have consistently held that elimination or restriction of parole eligibility is punitive. Warden v. Marrero, 417 U.S. at 662-63; see also, Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484, 495 (1972); Durant v. U.S., 410 F.2d 689, 691 (5th Cir. 1969). The Court of Appeals correctly followed these decisions.

B. Petitioner has Failed to Demonstrate a Conflict Between the Decision of the Court of Appeals and the Missouri Supreme Court.

Petitioner asserts that a conflict exists between the decision of the United States Court of Appeals for the Eighth Circuit and the Missouri Supreme Court concerning whether the MOSOP completion requirement can be applied retroactively as a condition of parole eligibility. Specifically, Petitioner asserts that the decision of the Court of Appeals in this case conflicts with the decision of the Missouri Supreme Court in State ex rel. Danny Baylis Houston v. Jimmy Jones, No. 72739 Mo. banc (June 19, 1990). The decision of the Missouri Supreme Court in that case is set forth in its entirety in the Appendix hereto. (See Appendix 1).

An examination of this summary order reveals that the Missouri Supreme Court did not in any way address the issue of the retroactive application of the MOSOP completion requirement. Petitioner has presented none of the facts of that case, nor has he provided any explanation of the issues which were present. Petitioner has also failed to exclude alternative grounds for this decision. In sum, there is simply no basis to conclude that the Missouri Supreme Court has made any ruling which conflicts with the decision of the Court of Appeals in this case.

C. The Issue Raised by Petitioner Does Not Present a Question of Sufficient Importance to Warrant Review on Certiorari.

Because of the narrow holding of the court below, the issue raised by Petitioner lacks importance sufficient to warrant discretionary review. The holding below is specifically limited to those prisoners who committed a sexual offense prior to the promulgation of the MOSOP completion requirement, and prior to the enactment of the current parole statute, and who have met the statutory and regulatory guidelines for parole under the prior parole statute, and have been denied parole eligibility due to their failure to complete the MOSOP.

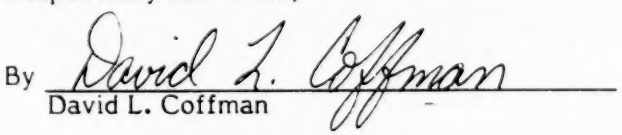
As the Magistrate correctly noted in her Report, the State of Missouri can require all sexual offenders, regardless of when their crime was committed, to participate in the MOSOP. In addition, all sexual offenders who committed their crimes subsequent to the promulgation of the completion requirement can be required to complete the program prior to parole eligibility. Finally, those sexual offenders to whom the prior parole statute is applicable are not eligible for release until the Parole Board finds that they can be released without detriment to theirself or the community. Unless that determination has previously been made, as it was in this case, the Parole Board could consider a sexual offender's participation in the MOSOP in determining whether he has met the statutory conditions for release.

Because these factors all serve to limit the applicability of the decision below, the issue presented is not one of general importance to the public as opposed to the particular parties involved. Accordingly, the issue is not worthy of discretionary review on certiorari.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

By 
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APPENDIX 1

In The Supreme Court of Missouri

No. 72739

May Session, 1990

State ex rel. Danny Baylis Houston, Petitioner,

vs. HABEAS CORPUS

James Parkett, Supt., F.C.C.,
et al., Respondent.

Now at this day, on consideration of the petition for writ of habeas corpus herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied. Billings, J., not participating.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1990, and on the 19th day of June, 1990, in the above entitled cause.

Given under oath my hand and seal of said Court, at the City of Jefferson, this 19th day of June, 1990.

_____ Clerk

_____ D.C.